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In the Supreme Court of the United States

OCTOBER TERM, 1956

MITSUGI NISHIKAWA, PETITIONER

v.

JOHN FOSTER DULLES, AS SECRETARY OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

J. LEE RANKIN,
Solicitor General,
WARREN OLNEY III,
Assistant Attorney General,
BEATRICE ROSENBERG,
RICHARD J. BLANCHARD,
Attorneys,
Department of Justice, Washington 25, D. C.

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In the Supreme Court of the United States

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No. 415

MITSUGI NISHIKAWA, PETITIONER

v.

JOHN FOSTER DULLES, AS SECRETARY OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A) is reported at 235 F. 2d 135.

JURISDICTION

The judgment of the Court of Appeals was entered on June 18, 1956 (R. 76) and the petition for a writ of certiorari was filed on September 13, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

1. Whether, in an action for a declaration of citizenship, a dual national, who is alleged to have expatriated himself by serving in the armed forces of a

foreign nation, has the burden of proving that the foreign military service was under duress and meets such burden by proving that the service was under the foreign nation's conscription laws.

~~2. If the answer to the foregoing question is "no",~~

Whether the statute providing for expatriation by voluntary service in foreign armed forces is constitutional.

STATUTE INVOLVED

Section 503 of the Nationality Act of 1940, 54 Stat. 1137, 1171, 8 U. S. C. (1946 ed.) 903, provided in pertinent part:

> If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. • • •

Section 401 of the Nationality Act of 1940, 54 Stat. 1137, 1168, 8 U. S. C. (1946 ed.) 801 (e), provided in pertinent part:

> A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

• • • • • •

(c) Entering or serving in the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state;

* * * * * *

STATEMENT

Petitioner seeks reversal of the judgment of the Court of Appeals for the Ninth Circuit (R. 76) affirming the judgment of the District Court for the Southern District of California dismissing his action for a judgment declaring him to be a citizen of the United States. The trial court found that petitioner had expatriated himself under Section 401 (c) of the Nationality Act of 1940, *supra*, "by reason of his voluntary entry and service in the Japanese Armed Forces while a national of Japan" (R. 12–13).

The evidence, other than documents, before the District Court consisted solely of petitioner's testimony. Petitioner was born in the United States at Artesia, California, on April 20, 1916 (R. 17). Until he was 23 years of age (R. 25), he lived in the United States and received his education in American schools (R. 18). In August 1939, following his graduation from the University of California with a degree in engineering (R. 46), he went to Japan in order to visit and study, intending to remain between two and five years (R. 26). At the time, he knew he was a national of Japan (R. 34) and that Japan was fighting in Manchuria (R. 25).

In Japan, petitioner began to study the Japanese language under a tutor (R. 35). When his father, a

resident of the United States (R. 29) who had paid his passage to Japan and was to finance his studies there, died in November 1939, leaving him without funds, he took a position with the Nakajuna Company, an aircraft manufacturer, in Ota City, Japan (R. 27).

About June 1940, pursuant to the Japanese compulsory military conscription law (R. 22–23), petitioner was required to take a physical examination (R. 18), and on March 4, 1941, pursuant to the same law, he was inducted into the Japanese army (R. 18). Between the time petitioner was notified to report for the physical examination and the time he actually entered the Japanese army, he made no effort to go to United States consular officials in Japan to tell them that he did not wish to serve in the Japanese army (R. 26–27). He also made no effort during this time to renounce his Japanese nationality, nor did he tell any Japanese official that he was an American citizen (R. 27).

When petitioner received notice to report to the Japanese army he did not protest (R. 30). He testified that he failed to protest his induction because rumors he had heard of Kempei Tei (police) brutality, which "might have been true", made him afraid to do so (R. 37). He explained his failure to go to an American consular office as based upon information received from a Nisei friend, employed at the embassy, that the American Consulate could not do anything for a dual-citizen Nisei (R. 43, 47–48). He also testified that at that time the Japanese police

were making monthly checks on his boarding house (R. 44).

Petitioner testified that he corresponded with his friends in the United States once a week (R. 28) and with his mother once every two weeks (R. 30), and that he met with Japanese friends who were American citizens (R. 28), but that he did not know that on September 16, 1940, the United States was drafting men into the United States army (R. 28, 30). He testified that he did not read any newspapers while in Japan (R. 29) and had no interest in Japanese national affairs (R. 47). He said that he knew England and France were then waging a war in Europe against Germany and Italy (R. 46), but did not know there was then a "cold" war between Japan and the United States (R. 46).

Petitioner testified that upon his induction into the Japanese army he was assigned to a training unit in Niwahuki for three or four months and was transferred to the 60th Air Force Regiment, also known as the 2378th Bomber Regiment, which was then in China, where he served until the end of the war (R. 30). After six months in China, he was transferred to French Indo-China, where he was at the time when war broke out with the United States (R. 32). After the fall of Singapore, he passed through there en route to the Philippines, where he arrived in February 1942 (R. 32). It was his duty in the bomber squadron to clean the fuselages of airplanes, to change sparkplugs and clean timers in airplane engines, and to do K. P. duty (R. 32-34). When Japan attacked

the United States, while petitioner was in Indo-China, he "told Japanese non-commissioned officers that "there wouldn't be any chance of Japan winning the war at all" (R. 37–38). The enlisted personnel of higher rank gave him a "thorough beating" that night and "for almost every day for a month" following, and on a couple of days a month thereafter (R. 38). While in the Japanese army he was nicknamed "America" (R. 38).

Petitioner was discharged from the Japanese army in August 1945. He went to the United States Consulate, on or about December 1, 1947, and applied for a passport to the United States (R. 19). About a year later, he received a Certificate of Loss of the Nationality of the United States, executed February 16, 1948, and approved by the Department of State on April 15, 1949 (R. 19–21).

On December 5, 1952, petitioner filed a complaint in the United States District Court for the Southern District of California against the Secretary of State for a decree adjudging him to be a citizen or a national of the United States (R. 3–5).[1] After a trial without a jury, the court found as a fact, *inter alia*, "VII. It is true that plaintiff's entry and service in the Japanese Armed Forces was his free and voluntary act", and entered a judgment that "Plaintiff has lost his United

[1] From the bench at the close of the trial, the court said in part (R. 55):

"Well, of course, the short answer to the entire argument, counsel, is that the court simply does not believe the testimony of the witness. That is all. I simply do not believe his testimony.

"He went to Japan when he was 25 years of age. He remained in Japan, and the entire world was in a turmoil all the time he was

States nationality, pursuant to Section 401 (c) of the Nationality Act of 1940, by reason of his voluntary entry and service in the Japanese Armed Forces while a national of Japan" (R. 10-13).

DISCUSSION

1. Petitioner contends that the decision of the court below, requiring him "to show that his entry into the armed forces was involuntary" (Pet. App. A, p. 10; R. 73), is in conflict with rulings of the Courts of Appeals for the Second, Third and Seventh Circuits, which he interprets as putting on the government the burden of proving that the expatriating act was voluntary (Pet. 9).

(a). However, the cases upon which he relies (*Lehmann* v. *Acheson*, 206 F. 2d 592 (C. A. 3); *Angello* v. *Dulles*, 220 F. 2d 344 (C. A. 2); *Stipa* v. *Dulles*, 233 F. 2d 551 (C. A. 3); *Schiaber* v. *Secretary of*

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in Japan. War is being waged in Europe. He is 23 years old. This isn't a case of a young boy that was taken to Japan in the early days like most of these cases, where a young boy was taken to Japan as an infant and he was reared in Japan and caught over there during the war and then was drafted into the service. Of course, there wasn't anything he could do. There was no way he could leave Japan. He was drafted. He had no choice. He went into the service or he went to jail.

"We don't have a situation like that. We have a young man who wasn't forced, in the first place, wasn't forced to go over to Japan, because he wasn't a child. He was 23 years old. He was a graduate from one of our greatest institutions of learning in this country with an engineering degree. And he went over there, and he knew he was registered over there in the family register, and he went over to do his duty as a Japanese national. That was the very purpose. That is why Congress enacted that legislation."

Stati, 175 F. 2d 492 (C. A. 7) ... reveal, upon critical analysis, that these circuits agree that the burden of proving duress to avoid the legal effects of an expatriating act rests upon the plaintiff dual-national who asserts it. In the *Lehmann* case, *supra*, the court twice adverted to the government's failure "to rebut the presumption that his entry and service in the Swiss Army as a result of conscription were involuntary", thereby impliedly acknowledging that the plaintiff had the burden (which the court found he met) of proving that his foreign military service was under duress and therefore involuntary. In *Angelo*, *supra*, the court recognized that the burden of proving duress to avoid expatriation, upon the taking of an oath of allegiance to a foreign monarch, rested upon the plaintiff when it stated that "the fact of the plaintiff's conscription into the Italian army was sufficient proof of duress to preclude a finding that his consequent taking of the oath was voluntary." Again, in *Stipa*, *supra*, though the court spoke generally of the heavy burden upon the government in expatriation cases, it recognized that duress was a defense to be established by the plaintiff and to be rebutted by the government. With the aid of judicial notice of economic conditions in post-war Italy, the court held that the plaintiff had met the burden of proving his defense of duress arising out of economic pressure.

The *Schiedt* case, *supra*, is inapposite to the problem of proving duress to avoid the expatriating act since it was not proved that the plaintiff had done anything which in law would expatriate her.

The rule as to burden of proof which most courts appear to follow, in cases where proof of the performance of the expatriating act is clear, was enunciated in *Perdoltee* v. *Acheson*, 202 F.2d 38, 40-41 (C.A. 2):

> "* * * The plaintiff has the burden of proving that he is a United States citizen. He made a *prima facie* case by alleging and proving his birth in New York. The Government then had the burden of showing that he had expatriated himself. This it did by proof of his oath of allegiance to the King of Italy. Presumptively this oath was voluntarily taken. He then had the burden of going forward with evidence to establish that it was taken under duress. * * *"

However, after the decision of this Court in *Gonzales* v. *Landon*, 350 U.S. 920, the Court of Appeals for the District of Columbia Circuit seems to have held that the burden of showing voluntariness rests with the Government. *Bogin* v. *United States*, decided July 25, 1956, Appendix, *infra*.

This rule on the burden of proof is in no way inconsistent with the rule of *Gonzales* v. *Landon*, 350 U.S. 920, that the standard of proof required in denaturalization cases is inapplicable to expatriation cases arising under Sec. 401(j) of the Nationality Act of 1940. That case involved expatriation by remaining outside the jurisdiction of the United States for the purpose of evading or avoiding military training and service, and the Court's holding was related to *the standard of proof necessary to establish the performance of the expatriating act*, which in that case included, by definition, the state of mind of the citizen. In cases such as the instant one, the expatriating act is objective, not involving by definition the subject's state of mind, and is usually not even controverted. Of course, if it is not admitted, it must be proved by clear and convincing evidence under *Gonzales*, *supra*. But the claim of duress in such cases is a matter of avoidance of the effect of the expatriating act, once it has been properly proved. *Gonzales* did not deal with that separate issue.

(b) With the exception of the recent *Brana* decision, *supra*, the divergence of views among the circuits in cases of expatriation arising out of military service in foreign armies appears to stem, not from conflicting opinions as to where the burden of proof lies, but from different views as to the quantum of proof necessary to show duress. The present status of the decisions is that the Courts of Appeals do not agree on the weight to be given to proof of conscription into the foreign military forces as establishing duress. The Second and Third Circuits have said that proof of conscription gives rise to a rebuttable presumption that the foreign military service was involuntary and casts upon the government the burden of rebutting it by proof that the service was in fact voluntary: *Lehmann* v. *Acheson*, 206 F. 2d 592 (C. A. 3); *Perri* v. *Dulles*, 206 F. 2d 586 (C. A. 3); *Angello* v. *Dulles*, 220 F. 2d 344 (C. A. 2). On the other hand, the Ninth Circuit in this case (Pet. App. A), and the District of Columbia Circuit hold that there is no presumption that conscription alone rendered foreign military service involuntary, but that all the circumstances surrounding such service must be examined to determine the voluntariness of the plaintiff's action: *Acheson* v. *Maenza*, 202 F. 2d 453 (C. A. D. C.); *Mata* v. *Dulles*, 221 F. 2d 52 (C. A. D. C.). And see the dissenting opinion in *Mandoli* v. *Acheson*, 344 U. S. 133, 139.

(c) The decisions of the different circuits are also in conflict on the weight to be given the plaintiff's "acts of omission," such as his failure to invoke the

assistance of American consular officers when faced with conscription, or his failure to protest to foreign authorities his induction into their armed forces in view of his claim to American citizenship. The Third Circuit has held that the plaintiff's failure to act is irrelevant to the question of the voluntariness of his service in the armed forces of a foreign state. *Lehmann* v. *Acheson*, 206 F. 2d 592; *Perri* v. *Dulles*, 206 F. 2d 586. The Ninth Circuit in this case (Pet. App. A) and the Second Circuit have ruled that the plaintiff's inaction is relevant as evidence of the voluntariness of his conscripted military service. *Pandolfo* v. *Acheson*, 202 F. 2d 38 (C. A. 2); *Angello* v. *Dulles*, 220 F. 2d 344 (C. A. 2).

(d). It is the position of the government that a plaintiff has the burden of proving that his expatriating service in a foreign army was involuntary and does not meet it or establish a *prima facie* showing of duress by showing simply that he was conscripted into the foreign army. Particularly, we think, he does not meet his burden where, as in this case, he was a dual national who had not been taken to the country of his other nationality as a minor and had not grown up there, but had gone abroad as an adult American.[4] The government also believes that all the circum-

[4] In *Mandoli* v. *Acheson*, 344 U. S. 133, the dual national had been taken to Italy as an infant, had grown up in Italy, and was inducted in a period of Fascist government. Neither that case nor the opinion of the Attorney General mentioned therein stand for the proposition that the mere fact of conscription in any country under any possible circumstances shows involuntariness *per se*.

stances, including acts of omission by the plaintiff, are admissible in evidence to show the character of the foreign military service."

But in view of the divergent views expressed among the circuits as to where the burden of proof lies and as to what constitutes voluntary service, we believe that the problem should be settled by this Court. It remains a question of importance, not only because cases continue to arise under the Nationality Act of 1940, but also because foreign military service by a person over 18 years continues to be a ground for loss of nationality under Section 349 (a) (3) of the Immigration and Nationality Act of 1952, 8 U. S. C. 1481 (a) (3), and the conclusive presumption of voluntariness as to dual nationals created by subsection (b) of that section applies only to those who lived in the foreign state for a total of ten years before the expatriating act.

2. Petitioner also contends that, as applied here, Section 401 (c) of the Nationality Act of 1940 is unconstitutional in that Congress lacks power to provide for the expatriation of any person born in the United States, except perhaps through the voluntary acquisition of a new foreign nationality. "We think that the validity of Section 401 (c), properly interpreted as it was below, has now been established," but since there have been several attacks in recent years on the constitutionality of Section 401 (c) and

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[1] See the government's brief in *Gonzales v. Landon*, No. 111, Oct. Term, 1955, at pp. 42-62; *Mackenzie v. Hare*, 239 U. S. 299; *Savorgnan v. United States*, 338 U. S. 491.

related provisions of the expatriation statute, we do not oppose consideration of that issue if the Court should feel it is still open.

CONCLUSION

For the foregoing reasons, the government does not oppose the grant of certiorari in this case.

J. LEE RANKIN,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
RICHARD J. BLANCHARD,
Attorneys.

OCTOBER 1956.

APPENDIX

United States Court of Appeals for the District of Columbia Circuit

No. 12348

FELICE BRUNI, APPELLANT

v.

JOHN FOSTER DULLES, APPELLEE

No. 12723

ANGELANTONIO SBROCCA, APPELLANT

v.

JOHN FOSTER DULLES, SECRETARY OF STATE, APPELLEE

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided July 26, 1956

Mr. David Carliner, with whom *Mr. Jack Wasserman* was on the brief, for appellants. *Mr. Irving Tranen* entered an appearance for appellant in No. 12348.

Mr. Lewis Carroll, Assistant United States Attorney, with whom *Mr. Oliver Gasch*, United States Attorney, was on the brief, for appellee. *Messrs. Leo A. Rover*, United States Attorney at the time record was filed, and *Harold H. Greene*, Assistant United States Attorney, also entered appearances for appellee.

Before BAZELON, FAHY and BASTIAN, *Circuit Judges*.

PER CURIAM: These consolidated appeals are from orders[1] of the District Court holding that Bruni and Sbrocca had expatriated themselves. Both were born in Italy of fathers who were naturalized citizens of the United States. Thus, appellants were nationals of the United States and of Italy.

The cases were tried and decided in the District Court prior to the decision of the Supreme Court in *Gonzales* v. *Landon*, 350 U. S. 920, and prior to our decision in *Saccodato* v. *Dulles*, 96 U. S. App. D. C. 337, 226 F. 2d 243. In *Gonzales* the Supreme Court held that in expatriation cases arising under section 401 (j) of the Nationality Act of 1940, 54 Stat. 1137, as amended, 8 U. S. C. §§ 501 *et seq.* (1946),[2] the same strict standards of proof required for loss of citizenship by denaturalization apply; that is, the proof of expatriation must be "clear, unequivocal, and convincing." *Schneiderman* v. *United States*, 320 U. S. 118, 125. Expatriation is not to be proved by evidence which "leaves the issue in doubt," as we put it in *Acheson* v. *Maenza*, 92 U. S. App. D. C. 85, 88, 202 F. 2d 453, 456. We set forth the same criteria in *Saccodato*, where we also repeated what we had said in *Alata* v. *Dulles*, 95 U. S. App. D. C. 182, 184, 221 F. 2d 52, 54, that factual doubts in expatriation cases are

[1] In No. 12348, affecting Bruni, the action of the District Court is denominated an Order, in No. 12723, affecting Sbrocca, a Judgment. We use the terms interchangeably in this opinion.

[2] Although § 401 (j) has to do with expatriation by departing from or remaining outside the jurisdiction of the United States in time of war or national emergency for the purpose of evading or avoiding training and service in the armed services, while these cases involve expatriation under other subsections of § 401, by taking an oath of allegiance to a foreign state, entering and serving in the armed forces of a foreign state, and voting in political elections in a foreign state, the same standards of proof must govern.

to be resolved in favor of citizenship. See, also, *Monaco* v. *Dulles*, 210 F. 2d 760 (2d Cir.); *Angelio* v. *Dulles*, 220 F. 2d 344 (2d Cir.); *Mandoli* v. *Acheson*, 344 U. S. 133; and the recent review of the subject in *Stipa* v. *Dulles*, — F. 2d — (3rd Cir.). All these decisions now make plain that when an American citizen is said to have expatriated himself, by joining the armed services of Italy, for example, or participating, after joining, in a mass swearing-of-allegiance, or voting in Italian political elections, the voluntary character of such acts must be proved under the strict standards above referred to, and that in determining voluntariness conscription or economic duress are relevant and important factors to be considered by the courts.

From the memoranda opinions of the District Court filed in these cases it appears that the criteria now established were not applied. Therefore, the orders will be reversed, and the findings and conclusions upon which they rest will be set aside. The cases will be remanded, however, for reconsideration, in the course of which the District Court in the exercise of a sound discretion may receive additional evidence should either party so request.

It is so ordered.